

1516103 (Migration) [2018] AATA 4607 (7 September 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1516103

MEMBER: Ian Garnham

DATE: 7 September 2018

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 07 September 2018 at 11:59am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) – Subclass 309 (Spouse (Provisional) – spousal relationship – applicant’s poor immigration history – departmental dob in – contravened relationship – marriage for a migration outcome – conflicting evidence about marriage – sponsor’s mental health issues – additional information not provided – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 359A, 359AA
Migration Regulations 1994 (Cth), r 1.15A Schedule 2 cls 309.211, 309.221

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 18 September 2015 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 6 November 2014 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211 and 309.221.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because after considering the evidence, *it is not sufficient to demonstrate that the applicant is in a genuine and continuing relationship with the sponsor*, accordingly they found that the visa applicant was not the spouse of the sponsor as defined in the legislation.
4. The review applicant (sponsor) appeared before the Tribunal on 30 November 2016 to give evidence and present arguments. The Tribunal also received oral evidence from [several individuals], and [the] visa applicant.
5. The review applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
6. A submission dated 26/09/2016 was provided to the Tribunal.¹
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the visa applicant is the spouse or de facto partner of the sponsor.

1. SPOUSE/DE FACTO (cl.309.211(2), cl.309.221)

Whether the parties are in a spouse or de facto relationship

9. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen by birth.
10. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the

¹At FF: 46 & 47 (AAT)

purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

11. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. A Certificate of Marriage, for the visa applicant and sponsor, [date] is contained in the Department's (DIBP) file.²
12. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

2. Background:

13. The visa applicant is [age] yo and was born in Lebanon. He came to Australia on 29/11/2012 on [another visa]. On 02/01/2013 he applied for a Protection visa and a delegate refused to grant the visa on 08/07/2013. That decision was reviewed by the predecessor of this Tribunal³ and on 02/01/2014 the RRT affirmed the decision not to grant the visa applicant a Protection visa. He was on a series of bridging visas from 02/01/2013 until he departed on 03/10/2014. The review applicant is [age] yo and was born in Australia.
14. The parties claim they first met on 28/12/2012 at a café and began living together at the review applicant's father's house after marrying in September 2013. They then went to Lebanon together in October 2014 and claim they lived with the visa applicant's family until the review applicant returned to Australia on 24/12/2014.

3. Financial aspects of the relationship:

15. The parties do not jointly own any assets or liabilities. They have not claimed a joint bank account but in the submission state that they transfer money between each other's bank accounts, but have provided no evidence of this.
16. At the hearing the review applicant showed the Tribunal eight Western Union money transfers from the review applicant to the visa applicant, between 29/02/2016 and 26/09/2016 for an average amount of \$335. There were also some further transfers but all were illegible.
17. The review applicant said that she has been in receipt of Newstart allowance since 2010. She said that the visa applicant's brother had paid the visa fees and for her tickets to travel to Lebanon; *he paid for everything*. The review applicant then said that she is currently paying the migration agent fees and had booked a ticket to travel to Lebanon in April 2016.

²at F: 49 (DIBP)

³ Refugee Review Tribunal (RRT) – [case number deleted]

18. The visa applicant claims that he did not work while in Australia, his uncle used to give him money. When I asked the visa applicant about his brother paying for the review applicant's airfares and the visa application fees he said he sold some land to his brother and he is paying him by instalments. He gives the money to the review applicant and she sends what is left to him.
19. The visa applicant's brother also gave evidence to the Tribunal he said he had given money to the review applicant; he was unsure of the amount but thought it was approximately \$5,000 in total. He said the money is the proceeds of land through the visa applicant. He also said that the practice began after January 2015.
20. The financial transactions variously described by the parties, appear to be direct transactions between the visa applicant and his brother, the role of the review applicant is best described as some type of intermediary. Because of this evidence I acknowledge that some type of financial association exists between the applicants; since at least late February 2016, and it may be argued that this represents a type of pooling of their financial resources. However, I have no confidence that these transactions were not put in place by the visa applicant and his brother to create an impression that the parties are pooling their financial resources. In any event, the evidence that was provided of the beginning of the financial transaction period (February 2016), postdate the date of application by almost 16 months.

4. Nature of the household:

21. The parties claim that they lived together after they married for a year before they departed for Lebanon. They claim they lived together in the review applicant's father's house with a brother of the review applicant. Both the brother and the review applicant's father gave evidence to the Tribunal. They both said that the parties lived together there for varying lengths of time during this period.
22. The review applicant said that the night of their wedding the visa applicant slept at her father's house with her and they lived as man and wife until they departed for Lebanon. She said, there was no planning, he just brought all his belongings and moved in after they married. When I asked the review applicant what they did during the day, she said they would watch movies and sometimes they would play basketball; her Dad was also not working. Her brother came to live there some months after they married and he was working when he lived there.
23. In light of other related matters (discussed) below, I do not consider the applicants and witnesses' evidence about this period and their cohabitation is necessarily accurate. The applicants and witnesses were unconvincing in their evidence about the time they claim the parties spent living here together. The documentary information about the period is skant; aside from a debt collector's letter dated November 2014, is no independent documentary evidence that indicates the visa applicant lived there at all. In addition, at the hearing, the review applicant and her father were definitive that the visa applicant came to live with them immediately after the wedding. Whereas at the DIBP interview conducted on 20/01/2015 the visa applicant said that he did not move in to the review applicant's father's house until 4 months after they married he is recorded as stating;

5. *...we lived apart for 4 months after the wedding. Her father did not approve our relationship, and then she started crying a lot so things worked out and her father accepted and I went to her house to live with them.*⁴

⁴at F: 191 (DIBP)

24. The delegate also considered this early period of the relationship and their claimed co-habitation in Lebanon. They concluded that the parties gave conflicting information about when they began living together, whether the review applicant's father approved of the marriage and about the visa applicant's living arrangements in Akkar, Lebanon. They also gave conflicting information about sleeping patterns, habits and household routines. Based on this evidence the delegate was; *...not satisfied that the applicant and sponsor have ever lived together as spouses or that they have future plans to reside together as spouses.*
25. The review applicant told the tribunal that she shared a room with the review applicant in his parent's house while living in Lebanon. The visa applicant told the tribunal that his parents were not at all happy when he married the review applicant because she is Christian.
26. There is no evidence before the tribunal of any joint living arrangements and/or any sharing of housework in the periods that they claim to have lived together.

6. Social aspects of the relationship:

27. The party's wedding was conducted in a minimal way. At the hearing, after repeated questioning the review applicant conceded that the only person that the parties knew who was at their wedding was the visa applicant's uncle. The review applicant then said that the church helped them out at the wedding. They provided them with the further 11 people who posed in their wedding photograph.⁵ They were married in a Catholic Church and claim they went to a hotel afterwards to celebrate.
28. None of the review applicant's family attended. Her father said he met the visa applicant one week before the wedding but was unable to attend. Whereas her brother said he did not meet the visa applicant until a few months after the wedding when the review applicant invited him over to their place, despite the evidence of the parties and her father that he moved in with the review applicant immediately after they married.
29. The visa applicant's brother said that he first met the review applicant in 2012 when she came to his house and was introduced to his family as the visa applicant's girlfriend. He did not go to the wedding and said he would not go inside the church but attended at the hotel afterwards. The visa applicant said that his sisters and brother in Australia did not attend because they initially rejected the review applicant because she is Christian. He said this has changed now and they like the review applicant. He also said his parents were not at all happy about his marriage but since they got to know the review applicant they now accept her.
30. The parties said that they signed a marriage contract while in Lebanon. I acknowledge that they have also provided a small selection of photographs taken when the review applicant was in Lebanon.⁶ However, there are no photographs that include any male relatives of the visa applicant and the photographs provided do not amount to evidence that the marriage has been formally recognised, or even announced to the members of the visa applicant's family. For this reason I am not satisfied that the visa applicant has fully advised his family of his marriage and that the review applicant has been accepted by them as his wife.
31. I acknowledge that the parties have provided a selection of internet communications and the review applicant also offered to provide the tribunal with evidence of regular

⁵at F: 177 (DIBP)

⁶ at F: 43 & 44 (AAT)

telephone contact with the visa applicant since she returned from Lebanon. I am satisfied that this contact has occurred.

32. However, for reasons set out above I am not satisfied that the contact is not contrived in an attempt to demonstrate that the parties are in a genuine and continuing relationship. In any event, all of this evidence of contact has occurred after the date of application.

7. *Nature of persons' commitment to each other:*

33. As mentioned above the visa applicant booked a ticket to travel to Lebanon in 2016, but in the end did not travel. She told the tribunal she found it difficult when she was in Lebanon in late 2014 and was too scared to go back there. The tribunal acknowledges that in view of the review applicant's health issues (discussed below) it would be difficult for her to travel to and remain in Lebanon.

34. During the hearing the Tribunal put 'dob-in information' to the parties pursuant to s.359AA of the Act. The certificated information was received by DIBP on 16/14/2014. At the hearing the visa parties stated that the information was incorrect. The Tribunal also presented the relevant content of this information by including it in a section 359A invitation⁷ that was sent to the review applicant after the hearing on 06/12/2016. The information was re-sent to the visa applicant on 08/08/2018.

35. The body of the information the Tribunal sent to the visa applicant was as follows:

In conducting the review, we are required by the *Migration Act 1958* to invite you to comment on or respond to certain information which we consider would, subject to your comments or response, be the reason, or a part of the reason, for affirming the decision under review.

Please note, however, that we have not made up our mind about the information.

Please also note most of this information relates to your claimed relationship at and around the date of application, 6 November 2014.

The particulars of the information are:

- 1) At the hearing conflicting evidence was provided between yourself and the visa applicant about events that occurred at the beginning of your relationship. While the Tribunal appreciates that these events occurred a long time ago; the Tribunal also considers that, given the limited length of your claimed physical relationship, the events are significant and that they would be accurately recalled by yourselves.
 - (1) For example:-
 - (2) You both agree you met on 28 December 2012, at a coffee shop, the review applicant said that she went to the coffee shop with [one lady], while the visa applicant said it was [another lady].
 - (3) The review applicant said that the next time you saw each other after your initial meeting was on New Years' eve when the relationship was consummated. The visa applicant says that the next time you met was on 3 January 2013 and the relationship was not consummated until about 20 days after you had met, at his uncle's house.

⁷ at FF: 82-87 (DIBP)

- 2) At the hearing conflicting evidence was also provided by most of the witnesses about the claimed early period of your relationship and how you all met each other. For example:-
 - (4) The visa applicant's brother said he met you in 2012, and that you came to his house and were introduced as the visa applicant's girlfriend. Your brother said that he met the visa applicant a few months after you married; that you invited him over to the house. Your father said that he met the visa applicant one week before the wedding and that you lived together at his house after you married.
 - 3) Aside from the visa applicant's uncle, not one person, now known to either of you, attended your wedding.
 - 4) You married on 14 September 2013 and both left Australia on 3 October 2014. The parties claim that after marriage they lived together at the review applicant's house with her father and brother. You have provided no independent evidence of this part of your relationship to verify that you lived together in a spousal relationship leading up to the date of application.
 - 5) This period coincides with the department receiving dob-in information stating that you did not live together and that the marriage had been conducted to achieve a migration outcome for the visa applicant. The relevant parts of this information, which relate to your claimed relationship, during this period, was [sic] also provided to you during the hearing.

This information is relevant to the review because, I am required to reach a view concerning the status of your relationship, and all of this information suggests that your relationship did not begin and continue up until the date of application as you say it did.

If I rely on this information in making my decision, I may find that you were not in a spousal relationship at the date of application.

You are invited to give comments on or respond to the above information in writing. The Tribunal will also accept any further documentary evidence that relates to this period of your claimed relationship with your submission.

36. On 23/12/2016 the review applicant's registered migration agent wrote to the Tribunal and provided the following further information;

- A letter from the review applicant's general practitioner dated 14/12/016.⁸ It states she has been a patient of the practice since August 2015, but a patient of the practice for many years. The review applicant has undergone various treatments to improve her physical and mental health. She attended on the day of the hearing in a distressed state. The review applicant has had a difficult life and mental health treatment for many years and expressed severe fears that her husband would not be allowed to join her in Australia. The general practitioner believed the support of her husband is important for her mental and physical health.
- A letter dated 24/11/2016 from the mental health nurse at the medical practice.⁹ It states that the review applicant; *...has been struggling with stress related to immigration factors, and being separated from her husband.* She expressed specific fears about attending the Tribunal hearing. A recent further stressor for the review applicant has been her father's health and frailty. The mental health nurse also expressed that she has limited support and it would be helpful to have her husband present to assist with dealing with her stressors.

⁸at F: 79 (AAT)

⁹at F: 80 (AAT)

37. Unfortunately the review applicant did not respond to the Tribunal's recent request to provide comments and/or responses to this information.
38. The Tribunal is sympathetic to the review applicant's health issues and does not doubt their authenticity. The review applicant also provided a letter from her treating Psychiatrist dated 07/06/2016.¹⁰ The Psychiatrist states that the review applicant is not well and will benefit by her husband being able to support her. An earlier report, from the mental health nurse dated 12 November 2015 was also provided to the Tribunal.¹¹ This report is also highlights the review applicant has reported the importance and significance of having her husband present to support her.
39. However all of the medical information provided, both after and before the hearing, does not respond to the issues, concerning time of application criteria raised in the 359A invitation in any way. In addition, the earlier medical information still post-dates the date of application by at least a year.
40. The delegate was also concerned about the inconsistencies in the evidence of the parties in regard to the then current status of the relationship. They concluded that the visa applicant had no knowledge of the review applicant's health issues. They also found that the parties gave conflicting and inconsistent information about how they spent recent significant dates and about planning to have a family.
41. The numerous glaring inconsistencies in the oral evidence of the parties and the witnesses create uncertainty about the status of the applicant's relationship primarily in the time of application period.
42. The purpose of the section 359A invitation was to provide the parties with an opportunity to address these issues. Unfortunately, in response to this invitation the review applicant provided information that is not relevant to this period; and did not respond at all to a recent invitation to address these issues.
43. The chronology of the visa applicant's migration history, outlined at paragraph 13 above. It is consistent with someone who has married at a time and with an expectation that the marriage would provide a means of achieving a migration outcome if other alternatives were to fail.
44. After consideration of all the evidence before me I am not satisfied that, at the time of application; this is a genuine and continuing relationship. I am also not satisfied that the visa applicant has a mutual commitment to a shared life as a married couple to the exclusion of all others. I acknowledge that current circumstances dictate that the parties must live separately and apart but am also not satisfied that they have lived together as spouses during the periods they claim to have done so.
45. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made.
46. I have also considered whether the circumstances of the parties meet the alternative criterion set out in cl.309.211(3) and have concluded that they do not.
47. Therefore the visa applicant does not meet cl.309.211.
48. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

¹⁰ at F: 22 (AAT)

¹¹ at F: 8 (AAT)

DECISION

49. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Ian Garnham
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).